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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 8

MEMPHIS & CHARLESTON RAILWAY COMPANY, *Appellant*,

v.

C. L. PACE, G. C. STEPHENS, R. C. GRISHAM, ET AL.,
Appellees.

Appeal from the Supreme Court of the State of Mississippi.

BRIEF FOR APPELLANT.

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IN THE

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OCTOBER TERM, 1929.

No. 276.

MEMPHIS & CHARLESTON RAILWAY COMPANY, *Appellant*,

v.

C. L. PACE, G. C. STEPHENS, R. C. GRISHAM, ET AL., *Appellees.*

Appeal from the Supreme Court of the State of Mississippi.

BRIEF FOR APPELLANT.

May It Please the Court:

STATEMENT OF THE CASE.

I.

The Questions Involved.

This is an attack by the Memphis & Charleston Railway Company on the validity of a special road improvement assessment against it growing out of the

creation of the Oldham Road District of Tishomingo County, Mississippi. The questions involved are as follows:

May a state, conformably with the due process and equal protection clauses of the Fourteenth Amendment, permit the carving out of haphazard, superimposed and overlapping special road improvement taxing districts, without limitation as to area, or amount of pyramided special taxes to be imposed, and

(1) impose a special assessment on all the property therein, personal as well as real, not in proportion to benefit, but in blind obedience to the criterion of general assessed values; and

(2) is not such special assessment palpably arbitrary and unreasonably discriminatory when the Memphis & Charleston Railway Company is assessed 62.39 per cent. of the cost of improving the Oldham road; when it owns only 1.9 per cent. of the acreage in the Oldham district; when its property is not benefited in the slightest by the improvement, though the other acreage has been increased in value 100 per cent.; when its acreage is assessed 83 times more than that of the other property owners; when the boundaries of the district have been so deliberately and expressly fixed as to include therein nearly a mile of additional right of way out of a total of less than three miles, though no part of the improved road lies within the additional section of land so included?

II.

Opinion of the Court Below.

This case is reported as *Memphis & Charleston Railway Co. v. Bullen*, —— Miss. ——, 121 Sou. 826, a copy of the opinions of the Supreme Court of Mississippi appearing at R. 211-215, and 231-247, herein.

III.

Jurisdiction of This Court.

Jurisdiction of this Court on appeal is invoked under Section 237a of the Judicial Code of the United States, as amended by the Act of February 13, 1925 (43 Stat. 937), 28 U. S. C. 344a (as in effect prior to the Act of January 31, 1928, 28 U. S. C. 861a, 861b, Chapter 14, 45 Stat. 54, or the amendatory Act of April 26, 1928, 28 U. S. C. 861b, Chapter 440, 45 Stat. 466), and pursuant to the provisions of the said last two mentioned acts of the year 1928.

IV.

History of This Suit.

This suit was instituted in the Chancery Court of Tishomingo County by bill filed on May 13, 1927, by appellant, the Memphis & Charleston Railway Co., a part of the Southern Railway System, seeking to enjoin the levy against the railroad of a special and local road district assessment, imposed on it by reason of its right of way being included in the boundaries of said special district, known as the Oldham Road District of said Tishomingo County. The bill attacked the constitutionality of Chapter 277, Laws of Mississippi of 1920, as being violative of appellant's rights under the Fourteenth Amendment. (Bill, R. 3-18.)

The defendants, being the Sheriff and Tax Collector, and the members of the Board of Supervisors, being the governing body of the County, filed their amended answer in the cause on December 12, 1927 (Answer, R. 18-35); a trial on the merits in the Chancery Court resulting in a decision on February 11, 1928, adverse to the railroad (Decree, R. 198-199).

The railroad appealed the case to the Supreme Court of Mississippi, the highest court of the State, assigning errors (Assignments of Error, R. 206-209), which court, through Division B thereof, rendered an opinion on December 22, 1928, affirming the court below (Opinion, R. 211-215).

Both appellant and appellees then filed Suggestions of Error (R. 215-230) pursuant to the rules of the court, and said court, having vacated its first decree, called for and heard a re-argument of the cause and thereafter, on April 15, 1929, a majority of the court, *en banc*, rendered an opinion again affirming the court below (R. 231-241), one of the judges filing a separate opinion specially concurring (R. 241-244), the Chief Justice filing a dissenting opinion (R. 244-247).

From the final judgment of April 15, 1929, the appellant filed its Petition for Appeal to this Court on July 8, 1929, which was allowed by the Chief Justice of the Mississippi court on that date. (R. 247-251.)

V.

The Facts.

The Mississippi System of Road Improvement.

Mississippi counties are each divided into five constitutional governmental subdivisions known as "Supervisor's Districts" (*Sec. 170, Constitution of Mississippi of 1890,* and *Sec. 3961, Hemingway's Code of 1927*). Counties issue road bonds (*Sec. 4007 Hemingway's Code*).

In addition to *county* road bonds, the creation of *special, superimposed and overlapping districts* for special taxation and the issuance of special road im-

provement bonds thereby is permitted by *Chapter 277, Laws of 1920* hereinafter discussed.

Such special taxing district *may* be composed of one or more Supervisor's Districts (Section 1, Chapter 277, Laws of 1920) but they are not so restricted, for the act, by its express terms, and as construed by the Supreme Court of the state in the decision herein appealed from, allows such districts to be arbitrarily carved out from any part of the county, and to be superimposed upon and to overlap any other special road district. Sec. 22 of the act provides:

> "Sec. 22. *A separate road district may be created from two or more districts or parts of two or more districts heretofore or hereafter created in the same manner and with same powers as are herein provided for the original districts,* but the creation of a district from two or more districts or parts of two or more districts *shall not release the territory or taxable property or persons of the former districts from assessments for the benefit and purposes of the original districts,* nor impair or in any wise release the property or persons in the new district so created from assessment and liability for the payment of the debts and obligations of the original districts; and the creation of such new district from two or more districts, or parts of districts already formed shall in no wise change the lines or territorial construction and integrity of the original districts from which such new district may be formed." (Italics added.) Sec. 22, Chap. 277, Laws of 1920.

As decided by the court below in this case, and also in *Prather v. Googe*, 108 Miss. 670, there is no limitation on the *area* to be included in such special and local districts (the law having no power to *modify* the

proposed boundaries of the district as selected by the 20 per cent. of the voters desiring the district), and there is no limitation on the *amount of the assessment* on the property in such special district except the maximum of 15 per cent. of the assessed valuation *of the property therein, without regard to or credit for prior bonded indebtedness which may have been imposed on such property by prior districts within which such property may have theretofore been included.* That is, the court below held that each special district could issue its own bonds up to 15 per cent. of the assessed values of the property therein, no matter whether other prior districts covering the same area had theretofore issued their bonds up to 15 per cent. of the assessed values *of the same property.*

Sec. 3, Chap. 277, Laws of 1920 (R. 139-150).
See Tenth Assignment of Error to the Supreme Court of Mississippi, R. 208.
Memphis & Charleston Ry. Co. v. Bullen, supra.

The Creation and Physical Aspects of the Special District.

The Oldham Road District is a specially created local taxing district organized pursuant to the provisions of Chapter 277, Laws of 1920 (R. 139-150), aforesaid, which provides for the creation of such special road districts, initiated by petition of 20 per cent. of the qualified voters in the territory selected by them for special taxing purposes, and it provides that after a favorable vote of such voters, the Board of Supervisors, who constitute the governing body of the county, shall organize the special district, *comprising only the boundaries expressly named in the original pe-*

tition, and issue the bonds thereof, the proceeds of which are to be used *only for the construction and maintenance of specially designated roads in the district.* (Chapter 277, Laws of 1920, Secs. 1-6, R. 139-143.)

The act provides in Section 4 that there shall be levied annually "*a special tax upon all the taxable property of such district * * * to be used exclusively in paying the interest on such bonds, and providing a sinking fund for their redemption,*" the assessment against such property for this purpose to be on the value thereof as assessed *for general taxation*, as provided in Section 9 of the act. (R. 145.)

Pursuant to such provisions, on January 4, 1926, 20 per cent. of the twenty-two qualified voters of a sparsely settled rural region of Tishomingo County filed an initiatory petition praying for the creation of the Oldham District (R. 38), describing and fixing its boundaries by metes and bounds so as to include in all 2,950 acres of land through which appellant's railroad runs diagonally, *the railroad's acreage in the district comprising 57.79 acres, or only 1.9 per cent. of the total acreage.* (R. 69-70.)

Following the filing of the petition, the other steps prescribed by the act were taken, including an election in which twenty-two voters participated, 19 voting in favor of, and 3 against the creation of the district; the district was organized (Minutes of the Board of Supervisors, R. 39-60) and issued and sold its bonds, in the amount of $6,500.00, on February 4, 1926 (Ibid.).

The Oldham District so created lies concentrically within the following taxing units, the County and the First Supervisors District being *general* governmental subdivisions for purposes of taxation, and the Lee

Highway District being *a specially created local taxing district,* all of which units had issued road bonds prior to the creation of Oldham District:

Taxing District	*Road Bonds Issued*
Tishomingo County	$300,000.00
First Supervisor's District	123,000.00
Lee Highway District	100,000.00
Oldham Road District	6,500.00

(R. 117.)

In addition to these road districts, the Oldham District lies wholly within a special school district called the Snowdown District, which had also issued special bonds of $3,500.00 prior to the Oldham District's organization (R. 117).

The haphazard and overlapping nature of such special road districts, created under Chapter 277, Laws of 1920, graphically appears from the plat reproduced at page 204 of the Record, which shows in contrasting colors that the Oldham District, colored solidly in orange, lies within the Snowdown District, which lies within the Lee Highway District, which comprises the First Supervisor's District (and another special district), which First District in turn is within, and a recognized subdivision of, the County. (R. 204.)

A plat of the Oldham Road District is also reproduced in the Record at page 204. The boundaries thereof, as fixed in the original petition of the voters, are shown in orange color, and comprise all of Sections 27, 28, 33 and 34, *and also fractional parts of Sections 20 and 29.* No parts of the Oldham roads are constructed within that part of Section 29 included in the District, but the effect of including this acreage of Section 29 therein, and of fixing the boundary of the road

district through the same *as "the southern boundary line" of the railroad's right of way* (Description of District, R. 39) *had the effect of increasing the railroad's mileage in the Oldham District by 8/10 miles of main track, or an increase in assessable mileage of 35 per cent.* (R. 71 and 82), *thus increasing the railroad's assessment at the State Tax Commission's rate of $35,000.00 per mile, hereinafter referred to, by $28,000.00.* (Ibid.)

Just north of the Oldham District lies a main road running from east to west, indicated in green on the map, known as the Free Bridge Road, which leads immediately to the town of Iuka, the county seat, about two or two and a quarter miles west of the west boundary of the District, from which town all railroad shipments are billed, *there being no station facilities in the District* (Test Davis, R. 71-72; Test. Allen, R. 168, 175).

Parallel to and only about two miles south of the Free Bridge Road, and running through the southern part of the District, lies the Lee Highway, shown on the map in yellow color, which runs also directly into Iuka, and is moreover the well known main artery for automotive travel all through Alabama and Mississippi to the West (Test. Davis, R. 72), *both it and the Free Bridge Road being improved highways prior to the creation of the Oldham District* (Ibid.).

The right of way of the appellant railroad, included in the District, is 2.88 miles long, and also runs generally from east to west; as shown in brown on the map, being substantially paralleled by the two main highways mentioned above (Map, R. 204).

Within the Oldham District is the Snowdown School, constructed by the school district of that name. (Map, R. 204.)

The Oldham District's roads, constructed from the proceeds of the bond issue, *are shown in red on the map* and consist of a little neighborhood road only 2¾ miles long connecting the Lee Highway with the Free Bridge Road, and a local branch, three quarters of a mile long, running to the property of the Allen Gravel Co. (Map, R. 204.) It is for the improvement of these already existing neighborhood and local roads, so shown in red on the map, that the appellant has been assessed to the extent hereinafter shown. (Test. Davis, R. 72.)

The Basis of the Special Assessment Within the Oldham District.

Now, as has been stated, Chapter 277, Laws of 1920, adopts as a basis for special road district taxation *the general property assessments for general ad valorem taxation* (R. 145), there being included in such assessments *personalty* as well as *realty* (Test. Freeman, Ex. B, R. 120).

Individuals and corporations in Mississippi other than public utility corporations are assessed by the county tax assessors (Chapter 177, Hemingway's Code of 1927), while railroads, on the other hand, are assessed solely by the State Tax Commission. (Chapter 192, Hemingway's Code of 1927, R. 150-159.)

In accordance with the above law the State Tax Commission made its final assessment against the appellant on the basis of $35,000 per main track mile and $4,500 per side track mile for all mileage in the state and certified its assessment on this basis to the county for such mileage of the appellant as lay within the county. (R., 118-123.

On June 2, 1926, *long after the Oldham bonds were issued and sold,* appellant received its first notice of

the organization of the Oldham District when it was requested by the State Tax Commission to show what part of its property lay within the same (R., 128-132). In obedience to such request, on July 23, 1926, appellant furnished a mechanical separation of its property by special districts to the Commission, and the Commission afterwards allocated the same and certified to Tishomingo County the amount of $113,200 as being the amount of assessable property belonging to the appellant within the Oldham District, *that amount being the present assessment attacked in this case.* (Exhibit "F" to Bullen's testimony, R., 204, and R., 117-118.)

The total assessment of all property within the Oldham District for 1926 was as follows:

Item	*Assessed Value*
Realty	$26,730
Personalty	35,070
Memphis & Charleston Ry. Co.	113,200
S. E. Exp.	115
W. U. Tel. Co.	1,556
Cumb. T. & T. Co.	1,958
Pullman Co.	1,219
A. T. & T. Co.	1,600
Total	$181,448

(Exhibit "B" to Freeman's Testimony, R. 120.)

The percentages of taxes assessed against the appellant in the County and its road taxing subdivisions for 1926 were as follows:

Subdivision	Total Valuation as of Feb. 1, 1926	Valuation M. & C. Ry. Feb. 1, 1926	Ratio M. & C. to whole
Tishomingo County	$4,196,493	$629,065	14.99%
1st Superv. District	1,249,516	373,235	27.87%
Lee Highway District	1,692,481	629,065	37.16%
Oldham Road District	181,446	113,200	62.39%

(Exhibit "B" to Freeman's Testimony, R. 120.)

It is seen from the foregoing that, *though appellant owns only 1.9 per cent. of the acreage, it is assessed 62.39 per cent. of the taxes within the District* (R. 120).

It is also undisputed that, though no other corporation and no individual pays on an assessment for intangibles within the District (except one man who is assessed on $150 of intangibles (R. 121), the appellant's assessment includes an undetermined and undisclosed amount for intangible or "franchise" value (R. 118), or, as is stated on the form promulgated by the State Commission: "*First main track includes value of waylands, station grounds, yards, road bed, bridges, rolling stock, block system, telephone and telegraph lines and franchise.*" (Exhibit "F" to Bullen's Testimony, R. 204.)

The individual land owners and certain corporations in the District thus own 2,892 acres, and their combined assessments for these special benefit taxes amount only to $68,248, while appellant, which owns 58 acres, is assessed $113,200 or 62 per cent. of the whole amount. Considered as acreage alone the assessment against appellant is on a basis of $1,958 per acre, while all the other lands are assessed on a basis of $23 per acre, *the railroad's assessment being 83 times as great per acre.* (R. 121-122.)

As has been stated, in the organization of the District the boundaries were so chosen as to include there-

in part of Sec. 29, though no part of the Oldham roads afterward constructed by the District lie within these sections; and the boundary through this section was specifically fixed *so as to include the right of way of appellant* through that part of Sec. 29 included in the District, the fixing of this boundary thus having the effect of including within the District 8/10 miles additional of main track mileage, which, as has been stated, at $35,000 per mile, increased the assessment against the railroad by $28,000.00 (R. 82).

The District's Roads do Not Benefit the Appellant.

As has been seen, the money derived from the sale of the Oldham bonds was used to straighten and improve a neighborhood road of about 2¾ miles in length with a fork of about ¾ miles, shown in red on the Plat Exhibit "A". These roads serve to connect the two improved highways, the Lee Highway and the Free Bridge Road, which run west into Iuka, parallel to each other and at a distance apart of about 2 miles, the two forks of the Oldham roads connecting with the Lee Highway at Oldham and at Gravel Siding, at each of which places are gravel pits which produce gravel in car load quantities which is shipped therefrom over the railroad of appellant. (R. 71-75.)

These Oldham roads are a great convenience *to the neighborhood and residents of the District* (R. 74-75), and are of direct benefit to the corporations owning the gravel pits, and there is testimony to the effect that their construction served to allay labor discontent at the gravel pits (R. 166-167), which have always since 1913 and 1914 produced a large gross revenue per annum to the appellant (R. 164 and 169). *But the labor unrest was largely produced by the lack of schools* (R.

166), and in the Snowdown School District, which was created a short time before the creation of the Oldham District, and overlaps the same, the appellant is assessed for and pays a large proportion (R. 75), from 60 per cent. to 72 per cent., of the Snowdown District taxes (R. 74 and 186). The Snowdown school house is within the Oldham District (Plat, R. 204).

There are no station facilities on appellant's railroad within the District, only freight in carload lots being shipped from the sidings at Oldham and Gravel Pit, all such shipments being billed from Iuka, about two miles west, and outside, of the District (R. 72, 168, 175).

The Oldham road does not tap any new or undeveloped territory, being an improvement, *only 2¾ miles in extreme length*, of a heretofore existing neighborhood road. (R. 72.)

The shipments from the inexhaustible gravel pits (R. 177) were somewhat larger in 1926 than in some previous years, but this was due to the large increase in building gravel roads in Mississippi and to the necessity of rehabilitating gravel roads in the Mississippi Delta destroyed in the floods. The Lee Highway, for the bonds of which the appellant pays 37.16 per cent. of the assessment (R. 120), runs through one, and within 200 yards of the other, gravel pit. (See Plat, R. 204, Test. Allen, R. 169.)

An occasional shipment of lumber has been made from Morrison's spur, which is not within the District, but access to which is facilitated somewhat by the improvement of the Oldham road, as well as from the gravel siding, both before as well as since, the organization of the District (R. 171, 184). But no shipments of lumber were made in the year 1926 and 1927. (R. 185.)

The town of Iuka is closer, by the Free Bridge Road, to a large part of the District than either of the gravel sidings or Morrison's spur (R. 175), and all agricultural and lumber products of the District, to be shipped by railroad, are still hauled to Iuka, as before the construction of the Oldham road. (R. 175.)

Farm lands in the District have been directly benefited by the Oldham road *to the extent of a 100 per cent, enhancement in value* (R. 186), *but there is no evidence of any enhancement in value of appellant's property in the District.*

On this point the witnesses say:*

Appellant's civil engineer Davis says:

> "Q. State whether or not from your observation and from the physical features which you have described, the construction of the Oldham roads would tend to decrease or increase freight and passenger traffic on the Memphis & Charleston Railway Co.?
>
> "A. My personal observation, they would have no effect whatsoever on the freight or passenger traffic, either by increasing or decreasing it."
>
> **(R. 73.)**

Appellant's superintendent Blackwell says:

> "Q. What effect, Mr. Blackwell, has the construction of those two roads up there in the Oldham Road District, of increasing the earning capacity of the Memphis & Charleston Railway Co., in this particular vicinity, or in that District?

*NOTE: Since this Court determines for itself the *fact* of whether a special imposition is arbitrary and discriminatory under the Fourteenth Amendment, and has heretofore, in *Road Improvement District No. 1 v. Missouri Pacific R. Co.*, 274 U. S. 188, and other cases, examined and quoted the testimony with regard to benefits, appellant has felt it necessary to set out *verbatim* the material testimony in the record on this vital point.

"A. In my opinion, it has not increased it any.

* * * * * * * * *

"Q. I will ask you whether or not the construction of those two roads in the Oldham Road District had any tendency whatever to increase the tonnage of gravel as hauled from those two pits?

"A. Certainly not."

(R. 86.)

Superintendent Rice of the M. & O. R. R. Co. says:

"Q. Mr. Rice, assuming that this is Oldham District, consisting of about 3,000 acres of land, and this road runs down to Oldham Gravel Pit, and that this road runs down to Allen Gravel Pit, and there is no depot in this territory, and all the gravel is billed out in Iuka, what effect would those two small roads have on the revenue of the Memphis & Charleston Railroad?

"A. I don't see why would be of any benefit."

(R. 94.)

Train master Foreline of the M. & O. R. R. Co. says:

"Q. Mr. Foreline, if Oldham Road District is located out east of Iuka, here, and there is a main thoroughfare, as indicated by this blue print up here, known as the Free Bridge road and one on the South, and parallel to the right of way of the Southern Railway Company, through this district, what benefit, as to revenues, would you say the construction of these two small roads in this territory, would have on Memphis & Charleston Railway Co.?

"A. One point that seems—

"Q. I say, what effect would it have on the increase or decrease in revenue, situated as it is here at Iuka and no depot in the territory?

"A. No depot on the railroad where comes on the railroad—no loading track or facilities?

"Q. Yes?

"A. Have no effect whatever."

(R. 100.)

Appellant's Freight Agent White says:

"Q. Mr. White, what effect has the building of hard surface roads had upon the local shipments of freight?

"A. Well, I would say that they have tended to materially decrease the Southern Railroad's revenues."

(R. 106.)

The only testimony on the part of the defendants in the record as to benefits to the appellant's railroad due to the improvement of the Oldham road is that of Mr. Allen, *Manager of the Allen Gravel Co.* (R. 161), and of Mr. Gains, a banker of the town of Iuka, *who bought the Oldham District's bonds for a customer of his bank* (R. 179).

Mr. Allen says:

"Q. What has been the effect of this improvement out there on the development of the community, farms and farm houses and fields and lands?

"A. Been considerable improvement in the way of farm houses being built, and been a little mercantile business established out there and a Dairy established since the road was built; been considerable acreage cleared up.

"Q. What effect does that have on the revenues of the railroad in that community?

"A. *I could not say exactly,* what the exact revenues has been, but the general revenues has been increased on account of that."

(R. 168, italics added.)

Mr. Gains says:

"Q. What did you say?

"A. I said I considered that land in the Oldham Road district—been benefited 100%.

"Q. In other words, that land is worth twice as much now as in 1926?

"A. I would consider it easily so, yes, sir.

"Q. How about the other land out there?

"A. Well I am speaking of the land in Oldham District.

"Q. You believe all the farming land has been benefited 100% by this road district?

"A. I did not say all, but speaking up and down the road and next to the school building and church.

"Q. You think the Railroad was benefited twice as much as the property owners who live along this road, where the road is built?

"A. Quite sure they have been benefited, *but I could not say to what extent.*

"Q. Now there is a general, not only in this Oldham Road District, but in all communities in Tishomingo County, particularly, there is a development of schools and churches is there not?

"A. Ask that again?

"Q. Throughout Tishomingo County, there is a general development of schools and churches, is there not?

"A. Not throughout the county, no, sir.

"Q. Well, greater portion of the county?

"A. Biggest portion, yes, sir; I think 40 or 50 per cent, may be 60 per cent.

"Q. And a greater development of roads throughout this county?

"A. In 60 per cent of it, yes, sir.

"Q. And this is a necessary development that is going on in a general way in the county?

"A. Not all over the county.

"Q. I say in the biggest part of it?

"A. Where—got good roads and consolidated schools, yes, sir.

"Q. You mean to say that the right of way of the railroad is specially benefited by the construction of these roads in Oldham Road District?

"A. Well, I did not say that, I don't think.

"Q. Just a general benefit to the community?

"A. I think they have been benefited from the increase of revenues that is shipped from out there, yes, sir."

(R. 186-187, italics added.)

The above testimony is all of the material testimony in the record on the question of benefits to the appellant, and it is on this testimony alone that the trial judge below erroneously concluded that the same showed indirectly that the improvement of the road would tend directly "to *slightly* increase the revenues of the railroad," in that it opened up a small territory which had furnished, and would probably continue to furnish, a comparatively small amount of lumber for shipment, and would be of indirect benefit in that it would have a tendency to settle labor conditions and aid in the operation of the gravel pits. (Opinion of the Chancellor, R., 195-196.)

This clearly erroneous conclusion as to the effect of the above testimony is repeated in the opinion of the majority of the supreme court below, where that court again held, clearly in error, that the improvement of the Oldham roads would be both of direct and indirect benefit to the appellant. (Final Opinion of the Court Below, R., 240.)

It is significant that the two gravel companies, though benefited more than anyone else by the construction of the Oldham road, according to Mr. Allen's testimony, *are each assessed only about 8 per cent of*

the total assessment (R. 67 and 120), *as contrasted with the 62.39 per cent with which the railroad is assessed* (R. 120).

Local freight and passenger business of appellant has decreased from 40 per cent to 60 per cent between 1923 and 1927, due to automobile and truck competition (R. 85, 94, 107).

All the evidence points to the unescapable conclusion that the Oldham District is a neighborhood project, initiated by 27 per cent of 22 voters, or only 6 individuals, for the sake of improving, and for the direct benefit only of the persons directly interested in, this little rural district, in the boundaries of which the railroad's right of way was included because thereby the railroad could be forced to bear almost two-thirds of the cost of the road, *of no benefit whatsoever to itself.*

The Validating Acts.

On January 4, 1926 (the very day the petition of the voters to create the Oldham District was filed), this Court rendered its opinion in the case of *Browning v. Hooper,* 269 U. S. 396, which declared a road district statute of Texas, very similar to Chapter 277, Laws of Mississippi of 1920, unconstitutional in its application to the parties to that suit; and, concerned for the validity of the special districts which had been organized in Mississippi, the Legislature of that State immediately began to pass special and general acts purporting to validate such districts, among them a special act, Chapter 1080, Laws of 1926, entitled, "An Act to Validate the Organization of the Oldham Road District" (R. 193-195), and Chapter 278, Laws of 1926 (R. 189-192), being a blanket act purporting to validate *all* special road districts theretofore organized

for which a special validating act had been passed at the 1926 session of the Legislature.

VI.

The Holding of the Court Below and the Issues of Law Before This Court.

Appellant's attack on the validity of the assessment was based, in the trial court, and in the Supreme Court of Mississippi, in addition to the Federal constitutional grounds hereinafter to be stated and urged in this Court, on many points of invalidity under the Mississippi laws and constitution, any discussion of which is foreclosed and rendered unnecessary by the opinion below, overruling appellant's contentions in that regard.

Appellant contended vigorously in the trial court below and in the Supreme Court of Mississippi, both on the original hearing and on re-argument, that Chapter 277, Laws of 1920, was violative of the due process clause of the Fourteenth Amendment in that where a special district was organized, as this one was, without notice or a right to hearing, appellant's constitutional rights were violated. In the first opinion of the supreme court below this contention of the appellant was assumed to be correct, but the court held that the validating acts cured this invalidity. After rehearing, in the final opinion of the majority of the court, it was held that because the Board of Supervisors had a right to *deny* the petition of the voters asking for the organization of the district, such district was the equivalent of a legislative district. From this holding of the majority, the chief justice of the court below vigorously dissented upon the ground that

the Board of Supervisors had no authority under the statute to deny such petition.

Appellant feels that from a practical standpoint the organization of the district and the assessment against it growing out of such organization does actually have the effect of taking its property without due process of law under the principles enunciated by this Court, particularly in *Browning v. Hooper,* 269 U. S. 396.

If such construction of the laws and statutes of the State by the State's highest court is binding here, appellant concedes that it is no longer possible to discuss in this Court any question relating to the technical validity of the original creation of the special district nor to the constitutionality of the validating acts *per se,* except as they purposely ratify and approve the scheme of special taxation imposed by the original act, Chapter 277, Laws of 1920.

If the decision below is binding here, it places the assessment against the appellant on the same plane legally as if it had been made originally by an express legislative enactment, and we therefore proceed to discuss the two principal issues in the case, first urged by the appellant in its bill, and successively argued before the trial and appellant courts below, namely:

> (1) May a state legislature, conformably with the rights afforded by the due process and equal protection clauses of the Fourteenth Amendment, carve out haphazard and overlapping territories superimposed over, and within and without the boundaries of recognized governmental subdivisions, for special road district taxation, and impose special assessments on all the property so arbitrarily selected and included therein, not in proportion to the benefits conferred on such property, but solely in proportion as such property

chances to be assessed for general purposes of taxation, including in such assessed values, personalty as well as realty?

(2) Is the assessment against the appellant in this case, imposed by force of the legislative authority contained in Chapter 277, Laws of Mississippi of 1920, and the Acts purporting to validate the proceedings thereunder; to wit, Chapters 278 and 1080, Laws of Mississippi of 1926, as construed by the Supreme Court of Mississippi, so plainly and palpably arbitrary, so grossly excessive in amount, so unreasonably discriminatory, and such a plain abuse as that it violates the protection afforded appellant by the due process and equal protection clauses of the Fourteenth Amendment?

The Supreme Court of the State, through the opinion of the majority *en banc*, answered the above questions in the *negative*, and thus upheld the validity of the above mentioned statutes of the State against the claim of the appellant that they were repugnant, as applied to appellant, to the Fourteenth Amendment to the Constitution.

ASSIGNMENTS OF ERROR.

First.

The Supreme Court of the State of Mississippi erred in holding that Chapter 277, Laws of Mississippi of 1920, and the acts purporting to validate the proceedings thereunder; to wit, Chapters 278 and 1080, Laws of Mississippi of 1926, and the proceedings pursuant thereto, whereunder the Oldham Road District was organized and purported to be validated, resulting in the assessment against appellant attacked herein, are, as applied to appellant, valid; the error being that said

laws are, and each of them is, and all of said proceedings are, unconstitutional and void, taking appellant's property without due process of law and denying to appellant the equal protection of the law, in violation of appellant's rights under the Fourteenth Amendment to the Constitution of the United States, in that under the terms of said statutes there is imposed special taxation upon all the property, personal as well as real, within the boundaries of the special road district organized thereunder, not in proportion to the specific benefits to such property, but on the basis of the valuation thereof for general purposes of taxation, such basis being palpably arbitrary and discriminatory; and in any event the inclusion of personal property in said assessment is capricious, arbitrary, and discriminatory; the said personal property in said district not being benefited at all by the local improvement for which the tax is assessed.

Second.

The Supreme Court of the State of Mississippi erred in holding that Chapter 277, Laws of Mississippi of 1920, and the acts purporting to validate the proceedings thereunder; to wit, Chapters 278 and 1080, Laws of Mississippi of 1926, and the proceedings pursuant thereto, whereunder the Oldham Road District was organized and purported to be validated, resulting in the assessment against the appellant attacked herein, are, as applied to appellant, valid; the error being that said laws and proceedings are unconstitutional and void, taking appellant's property without due process of law and denying to appellant the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States, in that said

assessment, made pursuant to the provisions of said laws, is so plainly and palpably arbitrary, is so grossly excessive in amount, is so unreaonably discriminatory, and is such a plain abuse as that it violates appellant's constitutional rights aforesaid.

BRIEF.

I.

Even though the Supreme Court of Mississippi may have characterized the district as "an ad valorem taxing district and not a special benefit assessment district," such characterization of the nature of the tax imposed is not binding on the Supreme Court of the United States.

Louisville Gas & E. Co. v. Coleman, 277 U. S. 32
Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389

Under the facts hereinbefore set forth, there is no question but that the assessment against the appellant is a special assessment for a local improvement under the holding of this court in the following cases:

Illinois Central Railroad Co. v. City of Decatur, 147 U. S. 190
Embree v. Kansas City Road District, 240 U. S. 242
Browning v. Hooper, 269 U. S. 396

Assuming that the special and local assessment attacked is the same as if made by the legislature itself, it is nevertheless always competent for the Court to enquire whether the legislative determination is so palpably arbitrary and so plainly abusive as to offend the due process clause of the Fourteenth Amendment.

Spencer v. Merchant, 125 U. S. 345
French v. Barber Asphalt Paving Co., 181 U. S. 324
Houck v. Little River Drainage Dist., 239 U. S. 254
Myles Salt Co. v. Iberia Drainage Dist., 239 U. S. 478
Embree v. Kansas City Road District, supra
Branson v. Bush, 251 U. S. 182
Valley Farms Co. v. County of Westchester, 261 U. S. 155
Thomas v. Kansas City Southern Ry. Co., 261 U. S. 481
Kansas City Southern R. Co. v. Road Improv. Dist. No. 3, 266 U. S. 379
Road Improvement Dist. No. 1 v. Missouri Pac. R. Co., 274 U. S. 188
Standard Pipe Line Co. v. Miller County Highway District, 277 U. S. 160

And though the assessment be made by the legislature itself, the Court may always enquire whether there is such manifest and unreasonable discrimination in fixing the benefits which the property will receive that the legislative determination contravenes the equal protection clause of the same Amendment.

Kansas City Southern R. Co. v. Road Improv. District No. 6, 256 U. S. 658
Thomas v. Kansas City Southern Ry. Co., supra
Kansas City Southern R. Co. v. Road Improv. Dist. No. 3, supra
Road Improvement Dist. No. 1 v. Missouri Pac. R. Co., supra
Standard Pipe Line Co. v. Miller County Highway District, supra

Such enquiry is always competent, irrespective of whether or not the legislature determines that the spe-

cial assessment for the improvement shall be based upon the general ad valorem assessed values, or in proportion to specific benefits to be found by a subordinate authority.

Thomas v. Kansas City Southern Ry. Co., supra
Kansas City Southern R. Co. v. Road Improv. Dist. No. 3, supra
Browning v. Hooper, supra

Chapter 277, Laws of Mississippi of 1920, permits the creation of *special and overlapping* road districts for local road improvement purposes without any limitation, and allows the imposition on all property, real and personal, arbitrarily selected for inclusion therein, of special improvement assessments, based not in proportion to the benefits conferred, but only upon the general ad valorem assessed values.

Chapter 277, Laws of Mississippi of 1920, particularly Sections 9 and 22.
Memphis & Charleston Railway Co. v. Bullen, —— Miss. ——, 121 So. 826

The Mississippi road improvement system is clearly distinguishable from the orderly and systematic division of territory permitted under the Louisiana laws as distinguished and approved by this Court in:

St. Louis & S. W. Ry. Co. v. Nattin, 277 U. S. 157

In the case of a special district organized in Mississippi under the machinery of Chapter 277, Laws of 1920, the purposes and objects of the improvement being purely local and special, the validity of the spe-

cial assessment depends upon the receipt of benefit, and if the imposition is palpably arbitrary and manifestly discriminatory, it offends against both the due process and the equal protection clauses of the Fourteenth Amendment, *even though the tax be based upon general ad valorem assessed values.*

Valley Farms Co. v. County of Westchester, supra
Thomas v. Kansas City Southern Ry. Co., supra
Kansas City Southern R. Co. v. Road Improv. Dist. No. 3, supra
Missouri Pac. Ry. Co. v. Road Improv. Dist., 288 F. 502
Kansas City Southern R. Co. v. Ogden Levee Dist., 15 F. (2d) 637
In Re Chicago R. I. & P. Ry. Co., 28 F. (2d) 56
Missouri Pac. R. Co. v. Mitchell County, 110 Kan. 582, 204 P. 729

In such a district, created for special and local improvement, the adoption by the legislature of the general ad valorem assessments of all property, personal as well as real, as the basis for the special assessments is, in itself and of its own force, so inherently lacking in the probability of producing even an approximately correct result as that it is repugnant to the rights afforded the taxpayer by the due process and equal protection clauses of the Amendment.

Gast Realty & Invest. Co. v. Schneider Granite Co., 240 U. S. 55
Kansas City Southern R. Co. v. Road Improv. District, No. 6, *supra.*
Thomas v. Kansas City Southern Ry. Co. (opinion in lower court, 277 F. 708), *supra*
Kansas City Southern R. Co. v. Ogden Levee Dist., supra

In Re Chicago, R. I. & P. Ry. Co., supra
Atchison T. & S. F. Ry. Co. v. Anderson County, 120 Kan. 240, 243 P. 282
Hesse-Rix Co. v. Krug, 319 Mo. 880, 6 S. W. (2d) 570

II.

Where an assessment for a special and local improvement is palpably arbitrary and constitutes a plain abuse, and is manifestly and unreasonably discriminatory, *to the extent shown in this case with reference to the assessment against the appellant attacked herein,* it is void as offending against the due process and equal protection clauses of the Fourteenth Amendment.

Thomas v. Kansas City Southern Ry. Co., supra
Kansas City Southern R. Co. v. Road Improv. Dist. No. 3, supra
Road Improvement Dist. No. 1 v. Missouri Pac. R. Co., supra
Standard Pipe Line Co. v. Miller County Highway Dist., supra
Missouri Pac. Ry. Co. v. Road Improv. Dist., supra
Kansas City Southern Ry. Co. v. May, 2 F. (2d) 680
Kansas City Southern R. Co. v. Ogden Levee Dist., supra
In Re Chicago, R. I. & P. Ry. Co., supra
Missouri Pac. R. Co. v. Mitchell County, supra
Atchison T. & S. F. Ry. Co. v. Anderson County, supra
Hesse-Rix Co. v. Krug, supra

ARGUMENT.

Introductory.

The essential matter for determination in this case is, preliminarily, the character of the assessment imposed upon the appellant, and then, it having been found to be a special assessment for a local improvement, the question is—is such assessment, under the facts, violative of the rights afforded appellant under the Fourteenth Amendment?

Since, at least, the case of *Illinois Central R. R. Co. v. City of Decatur*, 147 U. S. 190, this Court has always sharply distinguished between *taxes*, which are therein defined to be "*the exactions placed upon the citizen for the support of the government,*" and *special assessments*, which are defined as impositions "*upon property within a limited area for the payment for a local improvement, supposed to enhance the value of all property within that area.*"

Thus the fundamental fact upon which the validity of special assessments rests is the increment of value, or the benefit, bestowed upon the property taxed, resulting from the improvement.

In the case now before the Court, as has been stated above, the Supreme Court of Mississippi has arrived at a conclusion to the effect that the assessment district attacked by the appellant herein is not a special benefit assessment district, but is an ad valorem taxing district. In the first place, such terms of attempted distinction are without legal difference under the decisions of this Court. And even if there were a legal difference, such characterization by the highest court of a state concerning the essential nature of a public imposition is not binding upon the Supreme Court of

the United States, as this Court has held in *Louisville Gas & E. Co. v. Coleman*, 277 U. S. 32, *loc. cit.* 38, where it is said:

> "* * * we are not bound by the characterization of the tax by the state court * * *."

See, to similar effect, *Quaker City Cab Co. v. Pennsylvania, supra.* It follows, therefore, that this Court will, disregarding the form, examine the substantive features of the assessment in order itself to determine whether or not the assessment is essentially general on the one hand, or local and special, depending upon benefit for its validity, on the other.

The facts of the record, hereinbefore stated in this brief, lead to but one conclusion; namely, that this assessment, growing out of the creation of the special and local Oldham Road District, pursuant to the provisions of Chapter 277, Laws of 1920, is well nigh a perfect example of a special assessment for a peculiarly local improvement.

It is, of course, true, as this Court has said:

> "A state may defray the cost of constructing a highway, in whole or in part, by means of a special assessment upon property especially benefited thereby. But it is not obliged to do so. Road building is a public purpose which may be effected by general taxation."
>
> *Missouri Pac. R. Co. v. Western Crawford Road Improv. Dist.*, 266 U. S. 187 (*loc. cit.* 190)

And it is likewise true that where a state provides a general scheme of road improvement by means of the systematic and orderly subdivision of its territory

into recognized and non-overlapping districts, imposing general ad valorem taxes upon all the property therein, such a tax so imposed is essentially general, and is not local and special within the requirement that it must depend for its validity upon the receipt of special benefit by the taxpayer. This proposition has lately been decided by this Court after careful scrutiny of the general system of road improvement prescribed by the Constitution and laws of the State of Louisiana.

St. Louis & S. W. Ry. Co. v. Nattin, supra

As distinguished from such a system, however, the facts hereinbefore stated show without dispute that the Mississippi system provides in Chapter 277, Laws of 1920, for the creation only of typically special and local road improvement taxation districts. The facts which lead to this conclusion are:

(a) The territory to be included in such a special district is first selected by the arbitrary will of a small percentage of the voters in any portion of any county which they may personally desire to select, and the territory so selected is thereafter forever so fixed and determined, the court below having held in this case that though the governing body of the county may, in its discretion, *deny the petition* asking for the creation of the special district, neither such governing body, nor anyone else, has power under the law *to modify the boundaries* of the territory so originally selected.

Memphis & Charleston Ry. Co. v. Bullen, supra (R. 238)

(b) The act in question expressly permits the creation of superimposed and overlapping districts, with-

out any limitation whatsoever, *ad infinitum*, and expressly provides that the creation of additional and superimposed districts from all or parts of any former districts shall in no wise abrogate the integrity "of the original districts from which such new districts may be formed."

Secs. 2 and 22, Chap. 277, Laws of 1920.

(c) The funds derived from the sale of the special district's bonds may be expended only on those certain public highways adopted by the special district's commissioners for improvement, the act providing "that the public highway or highways so surveyed and adopted by such commissioners shall be constructed and maintained out of the proceeds of such bonds; proceeds of such bonds to be used alone in their construction and maintenance * * *."

Sec. 6, Chap. 277, Laws of 1920.

(d) The act as construed by the court below, permits the creation of such a district *without limitation on the amount of the bonds to be issued by it*, except that each district is prohibited from issuing its *own* bonds amounting to more than 15 per cent of the assessed values of the property *within the district itself*, but without regard to, or credit for, how many prior overlapping districts may have issued *their* bonds on the same, identical acreage, the supreme court below having expressly overruled, without comment, appellant's insistence that such pyramiding of bonded indebtedness by means of superimposed and overlapping districts was prohibited by the terms of the act.

Sec. 3, Chap. 277, Laws of 1920.
See appellant's *Tenth Assignment of Error to the Supreme Court of Mississippi* (R. 208)
Memphis & Charleston Ry. Co. v. Bullen, supra

(e) Both the Legislature of the State, and the Supreme Court, in the decision appealed from herein, have inferentially recognized that *benefit* to the property included within the special district is the criterion of the validity of the tax, as is shown by the wording of Section 22 of the act hereinbefore quoted, where it is provided that the creation of a new district from part of old districts shall not release the latter "from assessments *for the benefit and purposes of the original districts*," and as is shown in the decision below, where the majority of the court remarks that the Board of Supervisors of the County is vested with the legislative discretion of deciding "whether the *benefits* to be derived from the proposed district will be justified by the necessary tax burdens."

Sec. 22, Chap. 277, Laws of 1920.
Memphis & Charleston Ry. Co. v. Bullen, supra (*loc. cit.* 831)

Under almost identically similar facts, this Court has authoritatively held that such an assessment is special:

> "Resort may be had to general taxes and to special assessments to raise funds for the construction of improvement of roads. Missouri P. R. Co. v. Western Crawford Road Improv. Dist. 266 U. S. 187, 190, 69 L. ed. 237, 243. The proceedings in this case cannot be sustained as the levy of a general tax. The commissioners' court is authorized to levy general taxes for road

purposes up to a stated maximum on each $100 valuation. Art. 2242; Const. Art. 8, Sec. 9. The expenditure of the moneys so raised is not limited to any specified roads. And it is significant that, in the case of a road district, the court's duties in respect of the amount to be raised and the lands to be subjected to the charge are purely ministerial, and confined solely to carrying out the will of the petitioners when approved at the election. Here, on the initiation of individuals signing the petition, a special district was carved out to furnish credit and to pay for specified improvements on designated roads wholly within the territory selected. The purpose was special, and the district will cease to exist as a body corporate upon the payment of the bond debt. It is clear that the burdens here sought to be imposed on appellant's lands are special assessments for local improvements."

Browning v. Hooper, supra (*loc. cit. 403*).

Appellant thus shows that the assessment against it is a special assessment for a local improvement, and this being true, it is entitled to have this Court determine whether or not such assessment, both by reason of the force of the statutes involved, in and of themselves, and by reason of the effect of the assessment, is so palpably arbitrary that it offends the due process clause; and is so discriminatory as that it contravenes the equal protection clause of the Fourteenth Amendment. The right of this Court so to scrutinize the incidence of a special assessment, and for itself to determine whether or not the rights of the parties before it have been violated, irrespective of whether or not the basis adopted for imposing the assessment is general assessed value or special benefit, has been summed

in *Kansas City S. R. Co. v. Road Improv. Dist. No. 3, supra* (*loc. cit.* 386-7), where it is said:

> "By a long line of decisions in this court it has been settled that, where the state Constitution, as construed by the state court of last resort, does not provide otherwise, the legislature of a state may require that the cost of a local public improvement, such as the construction or reconstruction of a public road, be distributed over the lands particularly benefited, and charged against them *according to their value, their area or the benefits which they will receive;* may itself determine what lands will be benefited and in what proportions they will share in the benefits; and may avail itself, for the purposes of that determination, of any information which it deems appropriate and sufficient, including such as may be afforded by reports and estimates made in prior assessment proceedings having the same object. *Only where the legislative determination is palpably arbitrary, and therefore a plain abuse of power, can it be said to offend the due process of law clause of the 14th Amendment.* (Omitting citations.) *And only where there is manifest and unreasonable discrimination in fixing the benefits which the several parcels will receive can the legislative determination be said to contravene the equal protection clause of that Amendment.*" (Italics added.)

It having been demonstrated above, first, that the assessment is local and special, necessarily depending therefore upon the receipt of benefit for its validity, and second, that this Court will determine for itself whether or not such an assessment, even though imposed by express legislative enactment, violates the constitutional rights of the litigant invoking its jurisdiction, there remains for discussion but the one final

and the ultimate question; namely, does this particular assessment violate this appellant's constitutional rights? We may conveniently consider this question in its two aspects, stated technically in the two assignments of error set out above, but which may be more simply phrased:

(1) May the state select for local improvement an arbitrary portion of its territory and impose a special assessment on all the property therein, personal as well as real, with no reference to the benefits derived, but solely in blind obedience to the rule of general ad valorem assessed values?

(2) And, under these circumstances, is the assessment against the Memphis & Charleston Railway of 62.39 per cent of the cost of improving the Oldham road, when it owns only 1.9 per cent of the acreage in the Oldham District; when its property is not benefited in the slightest by the improvement, though the other acreage has been increased in value 100 per cent; when its acreage is assessed 83 times more than that of the other property owners; when the boundaries of the district have been so deliberately and expressly fixed as to include therein nearly a mile of additional right of way out of a total of less than three miles, though no part of the improved road lies within the additional section of land so included—is such assessment palpably arbitrary and unreasonably discriminatory?

Is the Adoption of the Ad Valorem Basis Inherently Invalid?

Let it be assumed that in a rural community in Mississippi, comprising 2950 acres, there are certain individuals who own 2892 acres, the value of which, to-

gether with their personalty, aggregates only $78,000; and that there is another resident therein whose realty amounts only to 58 acres, but by reason of his ownership of stocks, bonds and other personalty the value of all *his* property amounts to $113,000. Desiring the construction of a local road for the benefit of their land, and knowing that the system of special taxation for local road improvement in effect at the time permits the imposition of such special assessments on the assessed value of all personalty as well as realty, the owners of the 2892 acres decide to carve out the particular 2950 acres into a special district, knowing the law to be (a) that the boundaries they selected *cannot be modified*, and (b) that law *will automatically place 62 per cent. of the special taxes on the better-off owner of only 1.9 per cent. of the land*, and (c) that by fixing one boundary *south* instead of *north* of a portion of such owner's small acreage his assessment *will be automatically increased by 35 per cent.* This done, is it not true that *by force of the law itself*, the owner of the 58 acres has suffered from an imposition so arbitrary, and so discriminatory, as to be prohibited by the Fourteenth Amendment?

The authoritative opinions of the courts answer this question in the affirmative.

> "Benefits from local improvements must be estimated upon *contiguous* property *according to some standard which will probably produce approximately correct general results.*" (Italics ours.)
>
> *Kansas C. R. Co. v. Road Improvement District No. 6*, 256 U. S. 658, (*loc. cit.* 661)

"The differences were not based upon any consideration of difference in the benefits conferred, but were established mechanically in obedience to the criteria that the charter directed to be applied. The defendant's case is not an incidental result of a rule that, as a whole and on the average, may be expected to work well, but of *an ordinance that is a farrago of irrational irregularities* throughout. It is enough to say that the ordinance following the orders of the charter is bad upon its face as distributing a local tax in grossly unequal proportions, not because of special considerations applicable to the parcels taxed, but *in blind obedience to a rule that requires the result.*" (Italics ours.)

Gast Realty & Inv. Co. v. Schneider Granite Company, supra.

"While we are mindful that it is well-nigh impossible to lay down and prescribe a hard and fast rule for the establishment of special taxation districts which will not, in some instances, conflict with the Fourteenth Amendment to the Federal Constitution, and while we are also cognizant of the fact that exact uniformity and equality in assessment of lands for public improvements is not capable of human accomplishment, wherefore the courts must take a somewhat liberal view of the inequalities in assessment necessarily resulting from the application of any fixed rule of apportionment, and will not, therefore, as a general rule, give heed to complaints against a rule of apportionment which approximates justice and equality in assessment as nearly as may reasonably be possible, nevertheless, where the rule of apportionment used (as in this instance) palpably results in gross inequality of assessment, and arbitrarily, *and in blind obedience to a statutory or charter rule, distributes the burden of the cost of the improvement without regard to, or consideration of,*

> *the special benefits applicable to the several and respective parcels or tracts of land taxed, such rule of apportionment cannot be upheld,* and the special ordinance or the statute (as the case may be) which prescribes the rule of apportionment so used will be held unconstitutional, as contravening the Fourteenth Amendment to the Constitution of the United States, as against the defendant owner of the land so unequally assessed and taxed." (Italics ours.)
>
> *Hesse-Rix Co. v. Krug, supra.*

In the opinion of the Circuit Court of Appeals in the *Thomas* case, 277 F. 708, affirmed by this Court, (*Thomas v. Kansas City Southern R. Co.*, 261 U. S. 481) it is said:

> "The basis of valuation here employed for benefits is the valuation of all property within the district for general taxation. General taxation and assessment for special benefits are essentially different in their basic characteristics and their legal theories. One is grounded upon the idea that all property should bear a proportion, based upon value, of the burden of general taxation; the other is grounded upon the idea that property actually benefited by a public improvement should respond in proportion to the benefit so received. Obviously, any connection between the value of a given piece of property for general taxation and its value for benefit assessment taxation is purely accidental. Therefore the circumstance that the Legislature here took them to be identical carries no more force than if some other basis of value had been selected."

The same Eighth Circuit, in *Kansas City Southern Ry. Co. v. Ogden Levee District*, 15 F. (2d) 637, says:

> "This court has pointed out in Thomas vs. Kansas City Southern Ry. Co., *supra*, that there is no connection between general taxation and assessments for special benefits."

The fact that in this case the assessments were made by entirely different assessing authorities on different bases and for different purposes, conclusively, we submit, shows in and of itself discrimination, in view of the legislative adoption of such bases *for benefit assessments.*

It has been seen that individuals and other corporations are assessed by country assessing authorities, and the assessments as adopted for the basis of imposing the special taxes within the district show that only one individual, firm, or corporation other than appellant was assessed during the year in question upon intangible personal property, and that individual to the extent of only $150.00. It has likewise been seen that the assessment made against the railroad by the Tax Commission included therein not only a large, undisclosed amount for rolling stock, but likewise for the railroad's franchise or going concern value. The law under which the State Tax Commission is required to assess railroads contains the requirement that the assessment of such corporations must take into consideration "the value of the franchise, the capital stock engaged in the business in this State." (*Section 9368, Hemingway's Code of 1927, R. 152.*)

In the case of *In re Chicago, R. I. & P. Co.*, 28 F. (2d) 56, the court quotes, with approval, from *Railway Company v. Anderson County*, 120 Kan. 240, 243 Pac. 282, as follows:

"'The assessment of benefits against plaintiff's property appear to have been made, largely, *upon the basis of its valuation for the purpose of general taxation fixed by the state tax commission.* There was no independent investigation by the commissioners to ascertain a basis for proper valuation, no examination or inspection of the properties such an examination of rails and roadbed, listing of buildings, bridges, culverts, measurement of cuts or fills, etc., and no exercise of independent judgment by them upon the facts which were ascertained. The tax rolls of farm property as returned by the assessor and the report of the tax commission as applied to railroads, exclusive of rolling stock and material were adopted and used as a basis for assessment of benefits. *This was not a correct method.* The tax commission fixes its valuations of railway property by taking into consideration, not only the physical right of way and track, but *various other intangibles, including stocks and bonds* owned by the company, its connection with other roads, its earning capacity, *its value as a railway property, and other items reported to it.* The value is placed upon the property as a whole and apportioned on a mileage basis through the taxing districts which it traverses. It will readily be seen that the commissioners in the instant case were in error in merely adopting the value fixed by the tax commission with its rolling stock and materials excluded'." (Italics ours.)

In re Chicago, R. I. & P. Ry. Co., supra.

Appellant earnestly insists that the adoption by the legislature of the general assessed values, of personalty as well as realty, as the basis for apportioning special and local road improvement assessments on arbitrarily carved out, superimposed and overlapping

districts is in and of itself so arbitrary and discriminatory as to want due process of law and to deny the equal protection of the laws, to one whose property rights are affected.

Is the Assessment Itself Invalid?

The ultimate question in this record is whether the facts shown establish that the assessment levied upon the appellant violates its rights guaranteed by the Fourteenth Amendment.

Stating facts analogous to the facts in this record, this Court said:

> "The estimated cost of the improvement was about $75,000.00. For the purpose of defraying a part of this cost the directors levied, in the year 1918, a tax of $7,346.12, being 6 per cent of the assessed value of all real estate within the district. Of this amount it levied upon the railroads $4,194.60, being 6 per cent of the assessed value of their property. Upon the 12,000 acres of land, being all the other real estate in the district, the directors laid, in the aggregate, taxes of $3,151.52, being 6 per cent of its assessed value. Thus, 57 per cent of the burden was imposed upon the railroads and 43 per cent upon the owners of all the other real estate."

And, continuing, held:

> "The tax laid imposes upon the railroad, which can receive no direct or immediate benefit, a very heavy burden; and the lands which will receive a large direct (and possibly immediate) benefit are required to bear only a very small part of the burden. * * * The fact is that the tax levied is grossly discriminatory."
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> *Thomas v. Kansas City Southern R. Co., supra.*

The facts in this record are:

1. The entire district comprises 2,950 acres, of which 57.79 acres belong to the appellant, or only 1.9 per cent, while of the total assessment of $181,448, $113,200 thereof is against the appellant, being 62.39 per cent. of the total assessment.

2. Considered as acreage, the assessment against appellant is on the basis of $1,958 per acre, while the other lands in the district are assessed on the basis of $23 an acre, the railroad's assessment being 83 times as great.

3. The territory to be comprised in the district was so arbitrarily selected by the petitioners as to include therein a part of Section 29; however, no part of the Oldham roads lie within this section, the boundaries thus being fixed including an extra eight-tenths mile of main track mileage of the appellant, which, at the basis assessed, increased the assessment against the appellant by $28,000 alone.

4. Farm lands in the district have been directly benefited by the Oldham road to the extent of a one-hundred-per-cent increase in value, but there is no evidence of any direct enhancement in value of appellant's property, the record showing, on the other hand, that the local freight and passenger business of appellant has decreased from 40 to 60 per cent due to automotive competition.

5. The two gravel companies, which are benefited more than any one else in the district, are each assessed only 8 per cent of the tax, while the railroad, which is not directly benefited, is alone assessed 62 per cent of the entire tax.

6. The railroad's assessment includes large amounts of intangible and franchise values, while the only

other intangible assessment in the district is against one individual who is assessed for $150.

For illustrative purposes we tabulate the facts found in the following cases and compare them with the facts shown in *this* record:

Special Assessments Held Arbitrary and Discriminatory under the Fourteenth Amendment.

In *Railway Company v. Mitchell Co.*, 110 Kan. 582, 204 P. 729, farm lands assessed at $4 per acre, railroad's right of way at $57 per acre, *or 15 times greater.*

In *Mo. Pac. Ry. Co. v. Road Improv. Dist.*, 288 F. 502, farm lands assessed at $2.40 per acre, railroad's right of way at $200 per acre, *or 80 times greater.*

In *Kansas City Sou. Ry. Co. v. May*, 2 F. (2d) 680, farm lands were assessed at $8 per acre, railroad's right of way at $930 per acre, *or 116 times greater.*

In *In re C. R. I. & P. Ry. Co.*, 28 F. (2d) 56, farm lands were assessed at $52 per acre, railroad's right of way at $2,100 per acre, *or 40 times greater.*

In *Kansas City Sou. Ry. Co. v. Ogden Levee Dist.*, 15 F. (2d) 637, farm lands were assessed about $7 per acre, railroad's right of way about $2,000 per acre, or *285 times as great.*

IN THE OLDHAM DISTRICT, FARM LANDS ASSESSED AT $23 PER ACRE, RAILROAD'S RIGHT OF WAY AT $1,958 PER ACRE, OR 83 TIMES GREATER.

In *Thomas v. K. C. S. R. Co.*, 261 U. S. 481, railroad owned .3% of acreage *and was assessed 57% of the tax.*

In *In re C. R. I. & P. Ry. Co.*, 28 F. (2d) 56, railroad owned .8% of acreage *and was assessed 14% of the tax.*

In *Kansas City Sou. Ry. Co. v. May*, 2 F. (2d) 680,

railroad owned .3% of acreage *and was assessed 31% of the tax.*

In *Kansas City Sou. Ry. Co. v. Ogden Levee Dist.*, 15 F. (2d) 637, railroad owned .8% of acreage *and was assessed 59% of the tax.*

In *Road Improv. Dist. No. 1 v. Mo. Pac. R. Co.*, 274 U. S. 188, railroad owned .8% per cent of acreage *and was assessed 13.2% of the tax.*

IN THE OLDHAM DISTRICT, RAILROAD OWNS 1.9% OF ACREAGE AND IS ASSESSED 62.59% OF THE TAX.

In *In re Chicago R. I. & P. Ry. Co., supra,* the Court said:

> "The record here discloses that to the 25 acres of railroad right of way, approximately 1/120 of the total acreage of the district, has been apportioned *one-seventh* of the cost; that the benefit to the railroad property was slight in proportion to the benefit to adjoining land, and that the proportion assessed the company far exceeded any possible benefits derivable by it from the project. Such assessment cannot stand." (Italics ours.)

And referring to this Court's leading case on the subject, *Road Improvement District No. 1 v. Missouri Pacific R. Co.* (274 U. S. 188), it is found that therein the railroad successfully contested *the legislative assessment* against it of special taxes growing out of the inclusion of its property in a road district created by the legislature of Arkansas. The Road District was 24 miles long, and 5 or 6 miles wide, through which the railroad ran. In area it comprised 67,000 acres, while the right of way of the railroad therein was 565 acres, or 8/10 of 1 per cent. The entire benefits assessed aggregated $585,000, of which $75,000, or 13 per cent. was assessed against the railroad.

The opinion says:

> "From all the testimony we think there is ample ground for believing that the improved road will lead to an increase in the traffic and revenue of the railroad, as respects freight moving in carload lots and passengers traveling considerable distances, but that the benefit from this will be cut down by a substantial loss in local freight and passenger traffic attracted to motor-driven vehicles moving over the improved road. That such a loss in local traffic usually ensues when hard-surface roads adapted to use by motor-driven vehicles are constructed practically parallel to railroads is not only shown by the testimony, but is common knowledge. It received distinct recognition in the President's message of December 8, 1922, to Congress.
>
> "We think it also appears from the testimony that the increase in revenue reasonably to be expected will be greater than the loss, but that the excess will not be such as to justify an assessment of benefits of $75,686, or more than a small fraction of that sum. Indeed, on the present showing, we should regard an assessment in excess of $15,000 as passing the outside limit of reasonable judgment and plainly arbitrary.
>
> "Our conclusion is that the assessment against the railroad is unreasonably discriminatory in so far as it is based on personal property, and in this respect violates the equal protection clause of the Fourteenth Amendment, and that it is otherwise so excessive as to be a manifestly arbitrary exaction and in violation of the due process of law clause of the same amendment. In these respects the finding and holding below are well grounded."

We therefore submit that these facts and authorities conclusively establish that the special assess-

ment herein violates appellant's constitutional rights under the Fourteenth Amendment.

CONCLUSION.

Appellant is not seeking to evade its fair share of the tax burden. It conceives it to be its right to resist an exaction so plainly arbitrary and discriminatory as this is, and to this end it respectfully submits that the judgment of the court below should be reversed.

Respectfully submitted,

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